IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.1.2002

CORAM:

THE HONOURABLE MR.JUSTICE K.GNANAPRAKASAM

SA.NO.2018 OF 1989 and SA.No.850 of 1990

Ameenambal Beevi ..Appellant

Vs.

1.Gopalsamy
2.Seethalakshmi Ammal
3.Ramachandran
4.Mustafa
5.Sabarimalai ..Respondents
SA.NO.850 OF 1990

1.M.Gopalsamy ..Appellant

vs.

1.M.Ameenambal Bibi
2.A.Seethalakshmi Ammal
3.S.Ramachandran
4.M.Mustafa
5.M.Sabarimalai ..Respondents

! For Appellants: Mr. K.Rajkumar SA.No.2018/89
Mr. N.Maninarayanan SA.No.850/90

For Respondents: Mr. N.Maninarayanan SA.No.2018/89
Mr.K.Rajkumar SA.No.850/90

Appeals filed against the judgement and decree dated 10.1.1989 made in AS.No.165 of 1987 on the file of the Additional Dist
Ramanathapuram at Madurai in reversing the judgement and decree dated 23.7.1987 made in OS.NO.120 of 1982 on the file of the
Court at Srivilliputhur.
: JUDGMENT

1.The plaintiff and the 2nd defendant in OS.No.120 of 1982 have preferred the above second appeals against the judgement and decree dated 10.1.1989 made in AS.No.165 of 1987 on the file of the Additional District Court, Ramanathapuram at Madurai.

2.The plaintiff filed the suit for partition of the suit properties and for allotment of 1/2 share and for rendition of accounts by the defendants 1 and 2.

3.The brief facts are:There are four items of the suit properties. Items 1 and 4 originally belonged to one Sundaram Iyer and he had left a registered Will dated 11.8.1925, while he was in a sound and disposing state of mind, whereunder he had bequeathed items 1 and 4 to his mother Ramalakshmi to enjoy the same without any power of alienation and after her life time, items 1 and 4 shall be enjoyed absolutely by his brother Subbiar's son Agobilam Iyer. On the death of Sundaram Iyer, the Will came into effective. Ramalakshmi Ammal also died. Thereafter, items 1 and 4 came to Agobilam Iyer, the husband of the 1st defendant, namely, Seethalakshmi. Agobilam Iyer had leased out the properties to tenants. Agobilam Iyer also purchased item 3 under the sale deed dated 10.7.1 941and item 2 under the sale deed dated 29.6.45. Those properties were also leased out to the tenants. Agobilam Iyer died intestate in the year 1971, leaving behind him his wife, Seethalakshmi and mother Kuppammal. As per the Hindu Succession Act, both of them became entitled to share in the suit properties. Kuppammal also died intestate in the year 1973, leaving behind her son's widow, the 1st defendant and her deceased daughter's son, the 2nd defendant. On the death of Kuppammal, her undivided share devolved upon the defendants 1 and 2, each became entitled to share in the share of Kuppammal i.e. share in the entire suit properties. The plaintiff purchased an undivided share of the 1st defendant in the entire suit property under the sale deed dated 26.10.1978 and after purchase, item 1 of the suit property was handed over to the plaintiff and the other items were in the hands of the tenants, namely, the defendants 3 to 5. As a purchaser, the plaintiff filed the suit for partition and allotment of share and for rendition of accounts.

4.The 1st defendant filed written statement, wherein, she had accepted the Will dated 11.8.1925 left by Sundaram Iyer and also the other claim of the plaintiff. But, however, she has claimed that she is entitled to share in the share of Kuppammal i.e. share, apart from the share inherited on the death of her husband and thereby claims share in the entire properties.

5. The 2nd defendant filed a separate written statement, wherein, he has stated that item 1 of the suit property was the absolute property of Kuppammal. Item 4 was purchased by Kuppammal in the name of Agobilam Iyer, who is the husband of the 1st defendant. Hence, the Will executed by the Sundaram Iyer regarding item 1 and 4 of the suit property is not valid and binding upon him. The Will is not a genuine one and not validly executed. He denied the purchase of items 2 and 3 also by

Agobilam Iyer. It is stated that Agobilam Iyer was the guardian for the 2nd defendant and he was only a binamidar for the 2nd defendant. Agobilam Iyer was managing the property of late Kuppammal since he was the only adult male member in the family. He denied the claim of the plaintiff that Seethalakshmi, 1st defendant and Kuppammal became entitled to share. It is further stated that Kuppammal had executed an unregistered Will on 29.6.1971 in his favour and the same was executed when she was in a sound and disposing state of mind. The defendant denied the claim by the 1st defendant and in turn by the plaintiff.

6.The trial court, after taking into consideration all the aspects of the case, came to the conclusion that the plaintiff is entitled to share in the suit properties and granted decree in favour of the plaintiff. Aggrieved by the same, the 2nd defendant preferred an appeal in AS.No.165/1987 before the Additional District Court, Ramanathapuram at Madurai. The lower appellate court confirmed the judgement and decree of the trial court in respect of items 2 to 4 of the suit properties and set aside in respect of item 1 on the ground that item 1 of the suit property is a dwelling house and the 2nd defendant is entitled to the benefits of Section 23 of the Hindu Succession Act and the plaintiff's suit for partition is not sustainable as long as the 2 nd defendant chooses to divide the said item. Aggrieved by the same, the plaintiff as well as the 2nd defendant have preferred these appeals.

7.Though several substantial questions of law are raised in SA.No.201 8 of 1989, argument has been advanced by both the parties only in respect of question No.1 i.e. "Whether the lower appellate court acted illegally and misdirected itself in holding that Section 23 of the Hindu Succession Act will be attracted to the devolution of property of a Hindu female under Section 15 of the Act?" In SA.No.850 of 1990, the only substantial question of law raised is "Was the lower appellate court justified in upholding the plaintiff's title to the suit property, especially when it had not chosen to accept a part of the plaintiff's case which found favour with the trial court?"

8.Agobilam Iyer got items 1 and 4 under the Will executed by Sundaram Iyer and items 2 and 3 were purchased by Agobilam Iyer under two different sale deeds are not in dispute. The learned counsel for the plaintiff would contend that the 2nd defendant is not entitled to the benefits of Section 23 of the Hindu Succession Act. According to the learned counsel for the plaintiff, Agobilam Iyer was the absolute owner of all the items of the suit properties and he died intestate in the year 1971, leaving behind him his wife, Seethalakshmi and mother Kuppammal. According to the plaintiff, the succession opens on the date of death of Agobilam Iyer i.e in the year 1971 itself and at that time his wife and mother alone are the only heirs and both of

them are the heirs specified in Class I of the schedule to the Hindu Succession Act and therefore, each of them entitled to share in the suit properties. As Seethalakshmi became entitled to share in the suit properties, her sale in favour of the plaintiff is valid and therefore, he is entitled to maintain the suit for partition in respect of all the properties including the dwelling house, which is item 1.

9.The learned advocate for the 1st respondent, who is the 2nd defendant has submitted that Kuppammal is the absolute owner of item 1 of the suit property as she derived the same through her maternal grandmother. Item 2 was purchased by Kuppammal in the name of Agobilam Iyer. Therefore, the Will executed by Sundaram Iyer is not valid and she had left an unregistered Will on 29.6.1971, by which the 2nd defendant became the absolute owner of the entire properties.

10.The trial court as well as the lower appellate court categorically held that the unregistered Will said to have been left by Kuppammal on 29.6.1971was not proved in a manner known to law and rejected the case of the 2nd defendant.

11.Now the question arises for consideration of this court is whether the plaintiff, who is the purchaser of the dwelling house from the 1 st defendant, who is a female heir, is entitled to maintain the suit for partition in the dwelling house in view of Section 23 of the Hindu Succession Act.

12.The claim put forward by the 2nd defendant that he is entitled to the entire property based upon the unregistered Will and other circumstances as stated in the written statement was not accepted by the courts below and the findings of the courts below are all findings on facts and the 2nd defendant is also not able to establish his claim before this court also and in the said circumstances, the 2nd defendant's claim that he is entitled to the entire suit property is rejected.

13.Coming to the question whether the plaintiff, who is the purchaser from the 1st defendant of the dwelling house, is entitled to maintain the suit for partition, when the 2nd defendant himself has not chosen to divide the said item, which being a dwelling house.

14.The learned advocate for the 2nd defendant submits that on the death of Agobilam Iyer, his wife and mother, who were alive, became entitled to share each in all the suit properties. Kuppammal, mother of Agobilam Iyer died in the year 1973 leaving behind her predeceased daughter's son Gopalsamy, the 2nd defendant. The contention of the learned advocate for the 2nd defendant is that Gopalsamy and Seethalakshmi are the survivors entitled to the property of Agobilam Iyer, who died in

the year 1971. It is the further contention of the 2nd defendant that Gopalsamy, grandson of Kuppammal born through her daughter Subbulakshmi, is also an heir as specified in Class I of the Schedule to the Hindu Succession Act and he being a Class I male heir, unless he choose to divide the item 1 of the property, the 1st defendant Seethalakshmi, who is a female heir, is not entitled to maintain an action for partition. According to the learned advocate for the 2nd defendant, succession opens in this case, o nly on the death of Kuppammal and not on the death of Agobilam Iyer. I find it very difficult to accept the said argument advanced on behalf of the 2nd defendant. Section 8 of the Hindu Succession Act lays down the rules of succession in the case of males, which states as follows:-

"The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:-
i.firstly, upon the heirs, being the relative specified in Class I of the Schedule;
ii.secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the schedule;
iii.thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
iv.lastly, if there is no agnate, then upon the cognates of the deceased."
This section is so clear that succession commences when a male Hindu dying intestate i.e on the date of death of the male Hin
the owner of the entire properties is Agobilam Iyer, who is a male Hindu and who died intestate in the year 1971. As such, the succession to his properties opened in the year 1971 itself and not at the time when his mother died subsequent to him. Therefore, the argument advanced on behalf of the 2nd defendant has no legs to stand.
Admittedly, Agobilam Iyer died leaving behind him his wife, the 1st defendant and Kuppammal, mother and each of them entitled to equal share i.e. share in Agobilam Iyer's property, as both of them are h
specified in Class I of the Schedule. As succession opens on the death of Agobilam Iyer, his properties are vertically divided and Seethalakshmi, the widow gets share and Kuppammal, mother gets the other share. As such, the properties of Agobilam Iyer got split into two equal halves and his wife and mother became entitled to share each.
The argument advanced on behalf of the 2nd defendant that Agobilam Iyer's sister's son Gopalsamy, the 2nd defendant is a Class I heir of Agobilam Iyer cannot at all be accepted on the face of it. The Class I heirs on the date of death of Agobilam Iyer were only his wife and mother and as there was no other heirs for him, the claim of Gopalsamy, the 2nd defendant would only be in his mother's share and not in the share of Seethalakshmi, the 1st defendant.
gets split on the date of death of Agobilam Iyer and he died leaving behind him only two female heirs specified in Class I of the Schedule and in the absence of any male heir as specified in Class I, at that time, they became entitled to share each in the properties of Agobilam Iyer and Seethalakshmi sold her share to the plaintiff herein,

and that therefore, the suit instituted by the plaintiff for partition is maintainable in respect of the dwelling house also and the Section 23 of the Hindu Succession Act is not at all a bar. Se states as follows:-

"Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and hi property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein; Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

It is so clear that Agobilam Iyer died intestate leaving behind him

only two female heirs and he had not left any male heir, who would intervene in the division of the properties in respect of the dwelling house till he chooses to divide the said dwelling house.

15.Section 23 is a special provision dealing with the partition of a dwelling house and the right of the male and female heirs of the intestate therein. There can be no doubt that a female heir specified in Class I of the Schedule to the Act inherits a share in dwelling house absolutely. But, Section 23 postpones the right of such a female heir to claim partition of the dwelling house until the male heirs choose to divide their respective shares therein. The object behind this section seems to be to prevent fragmentation or disintegration of a family dwelling house at the instance of a female heir or heirs, to the prejudice of the male heirs. But, however, the said prohibition gets lifted when male heirs have chosen to partition it. As succession of a Hindu intestate is opened on the date of his death, both the male and female heirs specified in Class I of the Schedule, as on that date, have got to be taken into account. As Agobilam Iyer died intestate in the year 1971 leaving behind him only two female heirs, specified in Class I of the Schedule, the question of any male heir intervening in the division of the properties including the dwelling house do not at all arise and therefore, the 1st defendant was well within her right to sell share in the suit properties including her share in the dwelling house, which is item 1, to the plaintiff and his suit for partition and allotment of share in all the items of the suit properties is sustainable.

16.It is therefore clear that Seethalakshmi became entitled to share in all the suit properties of his husband Agobilam Iyer, which she is entitled to deal with as an absolute property and that therefore, the sale made by her in favour of the plaintiff is valid and in the said circumstances, the suit

instituted by the plaintiff for partition of all the properties including item 1, which is a dwelling house, is maintainable and the lower appellate court had lulled into an error in coming to the conclusion that Gopalsamy, the 2nd defendant is a surviving male heir as specified in Class I to Agobilam Iyer, which resulted in dismissing the claim of the plaintiff in respect of item 1 of the suit property and the said modification made by the lower appellate court deserves to be set aside and accordingly, it is set aside.

17.As I have arrived at a conclusion that Seethalakshmi and Kuppammal became entitled to share each, in all the properties, Seethalakshmi cannot claim any share in the property inherited by Kuppammal, as Seethalakshmi, is not an heir to Kuppammal and as such, her claim has got to be negatived.

18.In view of the conclusions reached above, the substantial question of law raised in SA.NO.2018 of 1989 is answered in favour of the appellant, who is the plaintiff in OS.No.120 of 1982 on the file of the Subordinate Judge, srcm K.GNANAPRAKASAM, J. Srivilliputhur. Consequently, the substantial question of law raised in SA.No.850 of 1990 is answered against the appellant.

19.In the result, the judgement and decree of the lower appellate court are set aside and the judgement and decree of the trial court are restored. Accordingly, SA.No.2018 of 1989 is allowed. In view of the findings reached in SA.No.2018 of 1989, the appeal in SA.No.850 of 1990 is liable to be dismissed and accordingly, it is dismissed. 20.In the peculiar circumstances, there is no order as to costs.

24.1.2002
Index:
Yes/No srcm
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Assistant Registrar

Sub Assistant Registrar

To:

1.The Subordinate Judge, Srivilliputhur
2.The Additional District Judge, Ramanathapuram at Madurai

SA.NOs. 2018/1989 and 850/1990